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9 **BEFORE THE**
BOARD OF PODIATRIC MEDICINE
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

13 GERALD D. AUSTIN, D.P.M.
956 Willowleaf Drive, #2605
14 San Jose, CA 95128

15 Podiatric Medical License No. E-4373

16 Respondent.

Case No. 1B-2002-138520
OAH No. N2003110285

**ORDER GRANTING
RECONSIDERATION AND ORDER
CORRECTING CLERICAL ERROR**

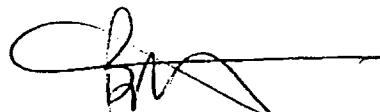
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18 The Petition for Reconsideration of James Rathlesberger, having come before the Board
19 of Podiatric Medicine, is hereby GRANTED.

20 **On reconsideration**, the Board of Podiatric Medicine hereby orders that the Decision and
21 Order adopted on March 17, 2004, be amended to provide the standard terms at Paragraphs 29
22 and 30, attached as Exhibit A to this Order.

23 This Decision shall become effective at 5:00 p.m. on April 16, 2004.

24 Dated: April 15, 2004

25 BOARD OF PODIATRIC MEDICINE

26 
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28 BRAD NAYLOR, D.P.M.
President

EXHIBIT A

29. PROBATION COSTS Respondent shall pay the administrative costs incurred by the BPM associated with probation monitoring each and every year of probation. Such costs shall be payable to the BPM at the end of each fiscal year. Respondent will be provided with an invoice at the close of each fiscal year which must be paid within 30 days of receipt. The final invoice will be provided upon termination of probation and is also due and payable within 30 days of receipt. Failure to pay such costs shall be considered a violation of probation.

30. NOTICE TO EMPLOYEES Respondent shall, upon or before the effective date of this Decision, post or circulate a notice which actually recites the offenses for which respondent has been disciplined and the terms and conditions of probation, to all employees involved in his practice. Within fifteen (15) days of the effective date of this Decision, respondent shall cause his employees to report to the BPM in writing, acknowledging the employees have read the Accusation and Decision in the case and understand respondent's terms and conditions of probation.

**BEFORE THE
BOARD OF PODIATRIC MEDICINE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation)
Against:)
)
)
GERALD DAVID AUSTIN, JR., D.P.M.)
)
)
)
Podiatric Medical License No. E-4373)
)
Respondent.)

File No: 1B-2002-138520

OAH No: N2003110285

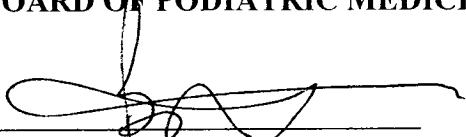
DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Board of Podiatric Medicine, Department of Consumer Affairs, State of California as its Decision in the above-entitled matter.

This Decision shall become effective at 5:00 p.m. on April 16, 2004.

DATED March 17, 2004.

BOARD OF PODIATRIC MEDICINE



Brad Naylor, D.P.M.
President

BEFORE THE
BOARD OF PODIATRIC MEDICINE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GERALD DAVID AUSTIN, JR., D.P.M.
956 Willowleaf Drive, #2605
San Jose, California 95128

License No. E-4373

Respondent.

Case No. 1B-2002-138520

OAH No. N 2003110285

PROPOSED DECISION

On February 02, 2004, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Lawrence Mercer, Deputy Attorney General, represented Complainant James Rathlesberger, Executive Director, Board of Podiatric Medicine, Department of Consumer Affairs, State of California.

Robert W. Stewart, Attorney at Law, 21 Tamal Vista Boulevard, Suite 295, Corte Madera, California 94925, represented Respondent Gerald David Austin, Jr., D.P.M., who appeared for all phases of the hearing.

Under Government Code section 11507, Complainant, through the deputy attorney general, amended the Accusation at page 5, lines 10 to 11, by striking the phrase: "Respondent also admitted that after he began his residency at Kaiser in 2002," and also by changing at page 5, line 11 the word "chief" to "senior," so that the remaining sentence at page 5, line 11 reads: "He found some blank prescription forms and [he] forged prescriptions using his senior resident's name."

On February 02, 2004, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. Complainant James H. Rathlesberger, ("Complainant") in his official capacity as Executive Director, Board of Podiatric Medicine, Department of Consumer Affairs, State of California, ("the Board") made, and caused to be filed, the accusation against Respondent Gerald David Austin, Jr., D.P.M. ("Respondent").

License History

2. On November 29, 2001, the Board issued certificate of licensure ("certificate") number E-4373 to Respondent that enabled him to practice podiatric medicine in the State of California.

Respondent's license will expire on March 31, 2005.

Stipulation and Admission

3. Respondent stipulates, and admits, to the truth of the allegations in the Accusation under the Second Cause for Discipline as follows:

... After Respondent was arrested on May 29, 2002, he admitted to the arresting officer that since October of 2000, when his stepfather passed away, he had been using his stepfather's name on false prescriptions to obtain hydrocodone.

... During the interview with the Medical Board investigator on March 25, 2003, Respondent admitted that he started abusing hydrocodone while he was a resident at the Los Angeles County and University of Southern California Medical Center 2000-2001 because the stress he was under exacerbated a back injury he had sustained in 1994 when he was hit by a truck while riding his bicycle. Respondent admitted that during this residency, he began falsifying prescriptions for hydrocodone for his own use using the names of his deceased father, his brother, and his mother. He found some blank prescription forms and forged prescriptions using his senior resident's name. These prescriptions were written in the name of family members but were for his own use.

... Respondent advised the Medical Board investigator that, in June of 2002, he voluntarily attended the West Valley Recovery Program through the Santa Clara County Health and Hospital System.

... Based on the above allegations, resident's license is subject to disciplinary action under section 2238 of Business and Professions Code in that Respondent violated, separately, jointly, or in any combination thereof, the following state statutes governing dangerous drugs and controlled substances: (1) Section 4060 of the Business and Professions Code in that Respondent possessed hydrocodone without having a valid prescription for such possession; and/or (2) Section 4324 (a) of the Business and Professions Code in that Respondent signed the name of his [senior] resident on hydrocodone prescriptions without his [senior] resident's knowledge or consent in order to obtain hydrocodone for his own use; and/or (3) Section 11157 of the Health and Safety Code in that Respondent issued false prescription for hydrocodone; and/or (4) Section 11173 of the Health and Safety Code in that Respondent obtained and/or attempted to obtain hydrocodone, a controlled substance, by using false/forged prescription(s); and/or Section 11368 of the Health and Safety Code in that Respondent used and/or attempted to use false and/or forged prescriptions in order to obtain a narcotic, hydrocodone.

Respondent's History of Criminal Convictions

4. On January 14, 2003, the California Superior Court in and for the County of Santa Clara, in case numbers CC268279, convicted Respondent, on his plea of guilty, of violating Health and Safety Code section 11368 [Forging, Altering, Issuing, or Uttering Forged or Altered Prescription], a felony. Also on that date, the superior court also convicted Respondent, on his guilty plea, of violating Business and Professions Code section 4060 (Possession of a Controlled Substance [Hydrocodone under the name "Vicodine] without a Prescription), a misdemeanor.

5. The facts and circumstances giving rise to the conviction in January 2003 involve matters that are set out in a Felony [Criminal] Complaint, dated November 15, 2002, by District Attorney's Office for the County of Santa Clara.

The felony complainant alleged two counts regarding Respondent's violation of criminal law. Count 1 sets out the allegation regarding Respondent's forgery of, and altering of, a prescription form under fictitious names and forged signatures of medical doctors so as to enable Respondent to procure for his personal use the narcotic drug - hydrocodone. Count 2 in the criminal complaint alleged that on or about May 29, 2002, in Santa Clara County, Respondent violated Business and Professions Code section 4060 when he possessed a controlled substance (that is hydrocodone) without possessing a valid prescription as issued by a physician, dentist, podiatrist or veterinarian.

San Jose Police Officer Luis Pinheiro appeared at the hearing to provide compelling evidence regarding his investigation and arrest of Respondent. The officer described Respondent scheme of using the name of his deceased step-father, that is Gary Lee, and his brother, that is Mickal Luxembourg, to clandestinely procure the controlled drug. The officer also noted that Respondent forged the name of "Richard R. T. Rose, M.D." as the prescribing physician. (Respondent conveyed that Dr. Rose of Los Angeles was the name of a medical doctor who worked in "the same hospital" in Los Angeles at which Respondent completed a residency program.)

Complainant offered into evidence the declaration of Dick Nishimoto that documents the pharmacy manager's recognition of the fraudulent acts of Respondent to illegally acquire controlled drugs.

6. As a consequence of the conviction on January 14, 2003, the superior court in a plea hearing found factual basis for Respondent's guilty plea for a felony forgery offense and a misdemeanor drug possession offense.

Under the plea Respondent faces a maximum term in state prison of three years, four months in the event he fails to comply with the form of probation¹ granted. The minimum jail term could be imposed should Respondent fail to adhere to his promises in court. Among other things, Respondent promised to avoid violation of the law.

Upon Respondent making the guilty plea, the superior court placed Respondent for 18 months in the "Deferred Entry of Judgment" program, which is defined in Penal Code section 1000. At the January 14, 2003, proceeding, the superior court made a finding that Respondent had fulfilled the requirement for drug counseling under the deferred entry of judgment form of probation.

The superior court required Respondent by March 31, 2003, to pay \$200 into the restitution fund.

Matters in Aggravation

7. Respondent has had a long term addiction of prescription drugs.

a. San Jose City Police Officer Luis Pinheiro appeared at the hearing of this matter to offer compelling and persuasive evidence on Respondent's admission regarding the length and extent of his use of the controlled drug - hydrocodone.

On May 29, 2002, upon investigating a report of possible drug procurement fraud at a Rite Aide Store, Office Pinheiro arrested Respondent. Respondent told the police officer

¹ Deferred Entry of Judgment under Penal Code section 1000.

that he had used the Schedule three controlled drug –hydrocodone [Vicodin] – for “a few years” since he was involved in a bicycle accident.

b. After his conviction in January 2003, Respondent pursued medical treatment on July 30, 2003, from Kaiser Medical Clinic in Santa Clara. Respondent gave a history of an automobile versus bike accident in 1994 that resulted in a neck/upper back injury.

A reasonable inference may be drawn that Respondent developed dependence upon use of hydrocodone (Vicodin), or other pain killer, as long as about eight (8) years before the date of his arrest.

Matters in Mitigation

8. In 2000, Respondent graduated from the California College of Podiatric Medicine with the degree of Doctor of Podiatric Medicine. He spent four years at the institution that is located in San Francisco.

9. For one year that ended in 2001, Respondent attended a rotating podiatric medicine residency at the University of Southern California Medical Center and Los Angeles County public medical facilities.

10. Over a period of about three years, Respondent participated in a post-graduate podiatric surgical residency program at Kaiser Permanente Santa Clara Medical Center in Santa Clara County.

11. While at the California College of Podiatric Medicine, Respondent’s name appeared on the Dean’s List for eight consecutive semesters.

In 1997, Respondent was recipient of a scholarship award from the Foundation for Excellence in Podiatric Medicine Scholarship program.

While in podiatric medicine school, Respondent was elected to the Pi Delta National Podiatric Honor Society, which is an organization that included students in the top 5% of academic excellence in podiatric medicine school.

12. Respondent relays that during the time that he was in a podiatric medicine residency program in Los Angeles County, his unemployed brother became an unexpected guest at Respondent’s studio apartment. About the same time, his mother came to depend upon him when Respondent’s step-father died. Notwithstanding the emotional content of his stories, Respondent offers no competent evidence to corroborate the account of the human tragedies that purportedly enhanced his “need” to take the drug that he depended upon – hydrocodone.

Matters in Rehabilitation

13. Respondent is now 33 years of age as he has a date of birth of March 16, 1970.
14. At the time when he suffered conviction in January 2003 for arrest in May 2002, Respondent readily acknowledged that he had an addiction to the illegal drug – hydrocodone (Vicodin).
15. Since January 2003, Respondent has had no arrests or criminal convictions.
16. As of the date of the hearing in this matter, Respondent has been sober and has lived a drug free life for about 22 months as of the date of the hearing of this matter.
17. On June 3, 2003 , Respondent attended his first meeting of Alcoholics Anonymous. He last attended a meeting of AA on February 4, 2004. However, his attendance at AA meetings has been irregular and inconsistent.
18. Regarding his dependence upon controlled drugs in order with stressors in his life, beginning in about June 2002 Respondent pursued one-on-one psychiatric treatment with Frank L. Annis, M.D., a diplomat with the American Board of Psychiatry and Neurology.

Matters that Suggest Respondent is Not Fully Rehabilitated From the Conviction in January 2003

19. Respondent has not completed all terms of the Santa Clara County Superior Court's deferred entry of judgment program, that is a form of probation, which is associated with his conviction in January 2003. The term of that special form of probation will not end before mid-June 2004.
20. On or about July 31, 2003, Respondent received Complainant's Accusation, dated July 29, 2003. However, Respondent did not inform management or supervisory personnel at Kaiser Medical Center in Santa Clara about the pending license disciplinary action by the Board. Also, after he met with the investigator of the California Medical Board on a date before he received the Accusation, he informed no responsible manager or supervisor within the graduate residency program at Kaiser Permanente of that meeting with the Medical Board's representative.
21. Respondent's attendance with Alcoholic Anonymous or other behavior modification group counseling has been sporadic.

In order to gain the superior court's ruling on January 14, 2003, regarding his successful attendance in abuse treatment or counseling, Respondent attended AA meetings

as follows: June 2002 - 15 sessions; July 2002 – eight sessions; August 2002 – six sessions; September 2002 – three sessions; October 2002 – eight sessions; November 2002 – 10 sessions; December 2002 – four sessions; and, January 2003 – one session.

But, after the superior court sentencing hearing on January 14, 2003, Respondent attended no AA or behavior modification sessions for five months. In June 2003, he attended one session.

For the balance of 2003, Respondent's records show his attendance at AA meetings as follows: July 2003 - two sessions; August 2003- zero meetings; September 2003 -12 sessions; October 2003 - 12 sessions; November 2003- one session; December 2003 - nine sessions.

For the month before the hearing of this matter, Respondent attended 12 sessions in January 2004. His records showed one session before the hearing date on February 4, 2004.

22. Evidence in the record suggests Respondent may have been less than candid, clear or consistent with his history when he conferred with his psychiatrist - Dr. Annis.

In a medical record dated June 4, 2002, which was about five days after his arrest for possession of controlled drugs and forgery of a prescription, the psychiatrist recorded that he was treating Respondent for "ADHD" [attention deficit/ hyperactivity disorder]. The doctor prescribed Respondent Adderall² 20 mg. twice per day. (Respondent "first consulted [the psychiatrist] on January 30, 2002, for medication management of his ADHD...." But, Dr. Annis's record shows no notation on June 4, 2002, as to Respondent's admission of being burdened by drug abuse or drug dependence problems.

On June 10, 2002, in his medical note Dr. Annis alludes to Respondent having "informed" the psychiatrist "of his usage of Vicodin outside of appropriate channels...." But, the medical doctor made no mention of Respondent suffering from any orthopedic ailment. Rather, Dr. Annis set out that Respondent's drug abuse "*got started clearly* as a result of the death of his step-father." [Emphasis added.]

On December 9, 2002, Dr. Annis again made no mention of Respondent suffering with residuals of an orthopedic injury, but rather the psychiatrist wrote: "the origin of his abuse was *clearly psychodynamic* and not criminal or partying in any fashion." [Emphasis added.]

In medical oriented correspondence, dated March 18, 2003, Dr. Annis reported Respondent's progress "for his psychological healing," but the medical doctor again made no mention of Respondent having chronic pain due to a back or neck ailment.

² "Adderall" is a "a single entity amphetamine product..." p. 3143, Physician's Desk Reference, 58th Edition, 2004. The PDR set out a standard warning: "Amphetamines have a high potential for abuse. Administration of amphetamines for prolonged periods of time may lead to drug dependence and must be avoided. Particular attention should be paid to the possibility of subjects obtaining amphetamines for non-therapeutic use"

Dr. Annis wrote a letter, dated January 14, 2002, that sets out an account of Respondent's "continued ...treatment ... for his condition of ADHD and recovery of a relatively *short-lived period* of substance abuse." [Emphasis added.] (At the time of his arrest on May 29, 2002, Respondent told the San Jose Police Officer Luis Pinheiro that he had used Vicodin since an injury "a few years ago" when the bicycle was involved in a traffic mishap. A Kaiser Hospital note, dated July 30, 2003, similarly records Respondent's history of an "auto v. bike" injury neck/upper back injury in 1994.)

23. A very short amount of time has passed since Respondent's arrest, and eventual conviction, for forgery of prescription forms and illegal possession of a controlled drug. About six months passed between the date of his conviction and the date of the accusation that is at issue. Moreover, only about 13 months have elapsed between the date of Respondent's conviction and the hearing in this matter.

24. Respondent is single. At the hearing Respondent presents no evidence that in Northern California he has family members or "significant others," who he can rely on for familial-like stability.

25. In August 2003, management and supervisory personnel at Kaiser Medical Center in Santa Clara placed Respondent on probation due to a perception that he exhibited unusual behavior. His supervisor asked him to seek counseling from the medical center's Employee Assistance Program.

In September 2003 Respondent resigned his position with Kaiser Medical Center in Santa Clara after management of the hospital became aware of the Board's Accusation.

26. Respondent has not been employed since September 2003 when his supervisor at Kaiser asked him to resign, or suffer discharge from the graduate residency program. At the hearing of this matter, Respondent offered no evidence as to his prospects for employment in the immediate future.

Dispositive Finding

27. The weight of evidence establishes that Respondent has attained a level of rehabilitation from his past history of drug abuse and criminal conviction that it would not be against the public interest for him to hold a certificate of licensure as a doctor of podiatric medicine so long as he adheres to terms of probation that enable the Board to closely monitor him for a term of years.

Costs of Investigation and Prosecution

30. The Complainant's representative - Andrew C. Hegelein, Supervising Investigator for the Medical Board of California - certifies that the following costs were incurred, as of January 28, 2004, in connection with the investigation and prosecution of the matters that led to the Accusation against Respondent:

Costs of Investigation Services:

23.75 hour at \$88.61 per hour	
\$2,104.49	
Urinalysis expense	\$130.72
Investigative Costs Subtotal	\$2,235.21
Attorney General [Department of Justice ("DOJ")]:	
Deputy Attorney General	
Fiscal Year 2002-03 6 hours at \$112 per hour	
\$672.00	
Fiscal Year 2003-04 31.50 hours at \$112 per hour	
\$3,528.00	
DOJ Subtotal	\$4,200.00
TOTAL Costs of Investigation and Prosecution	
incurred through the date of certification	\$6,435.21

31. Respondent provides no competent evidence to refute that Complainant's costs of investigation and prosecution are reasonable in the amount of \$6,435.

LEGAL CONCLUSIONS

1. Complainant accepts that "clear and convincing proof to a reasonable certainty" is the standard of proof to be applied as to facts in dispute under the Accusation from which disciplinary action may result against the license held by Respondent. (*Ettinger v. Board of Medical Quality Assurance* (1985) 135 Cal.App.3d 853.)

The Factual Findings and Order, herein, rest upon proof by clear and convincing evidence to a reasonable certainty that shows Respondent's acts and omissions in matters recorded herein.

2. Respondent is not persuasive in his argument that Penal Code section 1000 requires that the Board's decision not recognize that a conviction had been entered against Respondent in January 2003.

The Legislature, in its infinite wisdom, created under Penal Code section 1000 the scheme known as "deferred entry of judgment." The criminal court program works when an individual is faced with conviction under one of the dozen or so drug related crimes

described in the subject statutory section. If such individual is found eligible³ for a superior court to grant “deferred entry of judgment,” then after the passage of time, such as 18 months, and the affected person has not violated the law, the court expunges or seals the record of the original criminal court action as though a conviction had never occurred. However, in this matter Respondent fails to note subdivision (d) of Penal Code section 1000 that prescribes:

“(d) Deferred entry of judgment for a violation of Section 11368 of the Health and Safety Code shall not prohibit any administrative agency from taking disciplinary action against a licensee or from denying a license...”
[Emphasis added.]

Also, Respondent’s argument is rendered ineffective by way of the clear language of Business and Professions Code section 492 (Effect of Completion of Drug Diversion Program on Disciplinary Action or Denial of License) that sets forth:

Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program shall not prohibit any agency ... from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest....

The language of Business and Professions Code section 492 preempts or dominates the “deferred entry of judgment” scheme as set out under Penal Code section 1000, et seq. As indicated in case law, the phrase: “notwithstanding any other law” is a term of art that is emblematic of “an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern.” (*People v. DeLaCruz* (1993) 20 Cal.App.4th 955, 963 [25 Cal.Rptr.2d 202]) “This phrase [“notwithstanding any other provision of law”] has a special legal connotation; it is considered an express legislative intent that the specific statute in which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to require a dif-

³ An individual is eligible for deferred entry of judgment when faced with conviction under Health and Safety Code section 11386 (Forgery of a prescription to obtain drugs) when the illegal act is for personal consumption, and the guilty person has neither sold nor furnished another person with the controlled drug. Generally though, eligibility for deferred entry of judgment comes about when: (1) the defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense; (2) the offense charged did not involve a crime of violence or threatened violence; (3) there is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision; (4) the defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed; (5) the defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense; and (6) the defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

ferent or contrary outcome." (*Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1125-1126 [116 Cal.Rptr.2d 7];

The Board is lawfully able to conclude that Respondent suffered a conviction for crimes described herein notwithstanding the outcome of the superior court's deferred entry of judgment as authorized under Penal Code section 1000.

3. Business and Professions Code section 2497, subdivision (a) sets out that the Board may suspend, revoke or impose probationary conditions upon "a certificate to practice podiatric medicine for any of the causes set forth in Article 12 (commencing with Section 2220)" of the Code. Article 12 of the Business and Professions Code runs from section 2220 through section 2319.

4. Business and Professions Code section 2234 provides that disciplinary action shall be taken against any licensee who is charged with unprofessional conduct."

Business and Professional Code section 2236, subdivision (a) sets out that "[t]he conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct" Subdivision (d) of Code section 2236 prescribes that "... a conviction after a plea of nolo contendere is deemed to be a conviction The record of conviction shall be conclusive evidence of the fact that the conviction occurred."

Cause exists for revocation or suspension of the podiatric medicine certificate as issued to Respondent under Business and Professions Code sections 2234 and 2236, by reason of the matters set forth in Factual Finding 4.

5. Business and Professions Code section 2238 establishes that the "[a] violation of any federal statute or federal regulation or any of the statutes or regulations of [the State of California] regulating dangerous drugs or controlled substances constitutes unprofessional conduct."

Cause exists for revocation or suspension of the podiatric medicine certificate as issued to Respondent under Business and Professions Code sections 2234 and 2238, by reason of the matters set forth in Factual Findings 3 and 4.

6. Business and Professions Code section 2497.5 prescribes, in part, that "any licensee found guilty of unprofessional conduct [may be required] to pay to the [B]road a sum not to exceed the actual and reasonable costs of the investigation and prosecution of the" disciplinary action against the licensee.

The costs of investigation and prosecution of the Accusation as set out in Factual Findings 30 and 31 are reasonable. The reasonable costs of investigation and prosecution amount to \$6,435.

The total costs are not unreasonable, especially because the value of the time for the deputy attorney general and Department investigator who attended the hearing is not included in the certification of costs of the necessary prosecution of this matter.

Respondent is liable for the total amount of the costs of investigation and prosecution of the case in the amount of \$6,435.

7. In late 2001, the Board entrusted Respondent with a license as a medical care professional. But, Respondent violated the sacred trust vested in him by setting out to devise a scheme of fraud and deceit to use fictitious names and to forge the signature of a medical doctor so as to procure drugs for his personal use. Respondent's explanation of experiencing stressors that prompted his illegal acts is vacuous and self-serving.

Within six months of gaining license status, Respondent sustained the arrest that led to his eventual conviction. Notwithstanding Respondent's current proclamation of pursuing and attaining rehabilitation, the Board must establish a disciplinary order that assures Respondent's adherence to a rigorous course of absolute abstinence from illegal use of controlled drugs. Insufficient time since the conviction has elapsed so as to enable Respondent to avoid discipline against the license issued to him.

ORDER

Podiatric Medicine Certificate No. E-4373 as issued to Respondent Gerald David Austin, Jr., D.P.M., is revoked pursuant to Conclusions of Law 4 and 5, separately and for all of them. However, revocation is stayed and Respondent is placed on probation for five (5) years upon the following terms and conditions:

1. Service of Decision on Employer and Insurers

Within 15 days after the effective date of this decision the Respondent shall provide the Board of Podiatric Medicine ("BPM"), or its designee, proof of service that Respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where Respondent engages in the practice of medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

2. Recovery of Investigation & Prosecution Costs

The Respondent is hereby ordered to reimburse the BPM the amount of \$6,435 within 90 days of the effective date of this decision for the recovery of the actual and reasonable costs of the investigation and prosecution of this matter as provided for in Section 2497.5 of the Business and Professions Code. Failure to reimburse the BPM's cost of its investigation and prosecution shall constitute a violation of the probation order, unless the BPM agrees in writing to

tual and reasonable costs of the investigation and prosecution of this matter as provided for in Section 2497.5 of the Business and Professions Code. Failure to reimburse the BPM's cost of its investigation and prosecution shall constitute a violation of the probation order, unless the BPM agrees in writing to payment by an installment plan because of financial hardship. The filing of bankruptcy shall not relieve the Respondent of his or her responsibility to reimburse the BPM for its investigative and prosecution costs.

3. Obey All Laws

Respondent shall obey all federal, state and local laws, and all rules governing the practice of podiatric medicine in California.

4. Quarterly Reports

Respondent shall submit quarterly declarations, under penalty of perjury, on forms provided by the BPM, stating whether there has been compliance with all the conditions of probation.

Notwithstanding any provision for tolling of requirements of probation, during the cessation of practice Respondent shall continue to submit quarterly declarations under penalty of perjury.

5. Surveillance Program

Respondent shall comply with the BPM's probation surveillance program.

6. Interview with Podiatric Medical Consultant

Respondent shall appear in person for interviews with the BPM's medical consultant, upon request, at various intervals and with reasonable notice.

7. Tolling for Cessation of Practice

In the event the Respondent fails to satisfactorily complete any provision of the order of probation, which results in the cessation of practice, all other provisions of probation other than the submission of quarterly reports shall be held in abeyance until Respondent is permitted to resume the practice of podiatry. All provisions of probation shall recommence on the effective date of resumption of practice. Periods of cessation of practice will not apply to the reduction of the probationary period.

8. Tolling for Out-of-State Practice or Residence

In the event Respondent should leave California to reside or to practice outside the state, Respondent must notify the BPM in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

9. Completion of Probation

Upon successful completion of probation, Respondent's certificate will be fully restored.

10. Violation of Probation

If Respondent violates probation in any respect, the BPM, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against Respondent during probation, the BPM shall have continuing jurisdiction until the matter is final, the period of probation shall be extended until the matter is final and no petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation pending against respondent.

11. Compliance with Required Continuing Medical Education

Respondent shall submit satisfactory proof biennially to the BPM of compliance with the requirement to complete fifty hours of approved continuing medical education, meet continuing competence requirements, and possess a current, valid certificate in basic cardiopulmonary resuscitation (CPR) for relicensure during each two (2) year renewal period.

12. License Surrender

Following the effective date of this decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may voluntarily tender his or her license to the BPM. The BPM reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, Respondent will no longer be subject to the terms and conditions of probation.

13. Controlled Drugs - Total Restriction

Respondent shall not prescribe, administer, dispense, order or possess any controlled substances as defined in the California Uniform Controlled Substances Act, unless authorized by the BPM.

14. Controlled Drugs - Surrender of DEA Permit

Respondent is prohibited from practicing podiatric medicine until Respondent provides documentary proof to the BPM that respondent's DEA permit has been surrendered to the Drug Enforcement Administration for cancellation, together with any triplicate prescription forms and federal order forms. Thereafter, Respondent shall not reapply for a new DEA permit without the prior written consent of the BPM or its designee, or until successful completion of probation, whichever comes first.

15. Controlled Drugs - Partial Restriction

Respondent shall not prescribe, administer, dispense, order or possess any controlled substances as defined by the California Uniform Controlled Substances Act.

Respondent shall immediately surrender respondent's current DEA permit to the Drug Enforcement Administration for cancellation and reapply for a new DEA permit limited to those Schedules authorized by this order.

16. Drugs - Abstain from Use

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, and dangerous drugs as defined by Section 4211 of the Business and Professions Code, or any drugs requiring a prescription.

17. Drugs - Exception for Personal Illness

Orders forbidding Respondent from personal use or possession of controlled substances or dangerous drugs do not apply to medications lawfully prescribed to Respondent for a bona fide illness or condition by another practitioner.

18. Controlled Drugs - Maintain Records

Respondent shall maintain a record of all controlled substances prescribed, dispensed or administered by Respondent during probation. The record shall show the following: 1) the name and address of the patient, 2) the date, 3) the

character and quantity of controlled substances involved, and 4) the pathology and purpose for which the controlled substance was furnished.

Respondent shall keep these records in a separate file or ledger in chronological order, and shall make them available for inspection and copying by the BPM or its designee, upon request.

19. Prescribing Practices Course

Within 60 days of the effective date of this decision, Respondent shall enroll in a course in prescribing practices, approved in advance by the BPM or its designee, and shall successfully complete the course during the first year of probation.

20. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at Respondent's cost, upon the request of the BPM or its designee.

21. Rehabilitation Program - Alcohol or Drug

Within 30 days of the effective date of this decision, Respondent shall submit to the BPM for its prior approval a rehabilitation treatment program. Within 30 days of approval of said program Respondent shall enroll and participate until the BPM or its designee determines that further treatment and rehabilitation is no longer necessary. Quitting the program without permission or being expelled for cause shall constitute a violation of probation by respondent.

22. Community Service - Free Services

Within 60 days of the effective date of this decision, Respondent shall submit to the BPM for its prior approval a community service program in which Respondent shall provide free medical services on a regular basis to a community or charitable facility or agency for at least eight (8) hours a month for the first 36 months of probation. Neither Respondent nor Respondent's practice nor any partner, associate or employee of Respondent shall benefit financially from such a community service program.

23. Ethics

Within 60 days of the effective date of this decision, Respondent shall submit to the Board of Podiatric Medicine for its prior approval a course in Ethics, which Respondent shall successfully complete during the first year of probation.

24. Psychiatric Evaluation

Within 30 days of the effective date of this decision, and on a periodic basis thereafter, as may be required by the BPM or its designee, Respondent shall undergo a psychiatric evaluation by a BPM-appointed psychiatrist who shall furnish a psychiatric report to the BPM or its designee. The Respondent shall pay the cost of such an evaluation. Respondent shall make such payment directly to the psychiatrist consistent with arrangements made with the psychiatrist. The BPM shall not be responsible for collecting or ensuring such payments. Any failure to make such payments within 60 days of the agreed-to arrangements shall be deemed a violation of probation and grounds for further discipline.

If Respondent is required by the BPM or its designee to undergo psychiatric treatment, Respondent shall within 30 days of the requirement notice, submit to the BPM for its prior approval, the name and qualifications of a psychiatrist of respondent's choice. Upon approval of the treating psychiatrist, Respondent shall undergo and continue psychiatric treatment until further notice from the BPM. Respondent shall have the treating psychiatrist submit quarterly status reports to the BPM. The Respondent shall pay the cost of such treatment.

Respondent shall not engage in the practice of podiatry until notified by the BPM of its determination that Respondent is mentally fit to practice safely.

25. Psychotherapy

Within 30 days of the effective date of this decision, Respondent shall submit for prior approval to the BPM or its designee, the name and qualifications of a psychotherapist of respondent's choice. Upon approval, Respondent shall undergo and continue treatment until the BPM deems that no further psychotherapy is necessary. Respondent shall have the treating psychotherapist submit quarterly status reports to the BPM. The BPM may require Respondent to undergo psychiatric evaluations by a BPM-appointed psychiatrist. The Respondent shall pay the cost of such evaluations. Respondent shall make such payment directly to the psychotherapist. The BPM shall not be responsible for collecting or ensuring payments. Any failure to make such payments within 60 days of the agreed-to arrangements shall be deemed a violation of probation and grounds for further discipline.

If, prior to the termination of probation, Respondent is found not to be mentally fit to resume the practice of podiatric medicine without restrictions, the BPM shall retain continuing jurisdiction over the respondent's license and the period of probation shall be extended until the BPM or its designee determines that the Respondent is mentally fit to resume the practice of podiatric medicine without restrictions.

26. Medical Evaluation

Within 30 days of the effective date of this decision, and on a periodic basis thereafter as may be required by the BPM or its designee, Respondent shall under go a medical evaluation by a BPM-appointed physician who shall furnish a medical report to the BPM or its designee. The Respondent shall pay the cost of such evaluation.

If Respondent is required by the BPM or its designee to undergo medical treatment, Respondent shall within 30 days of the requirement notice, submit to the BPM for its prior approval the name and qualifications of a physician of respondent's choice. Upon approval of the treating physician, Respondent shall undergo and continue medical treatment until further notice from the BPM. Respondent shall have the treating physician submit quarterly reports to the BPM. The Respondent shall pay the cost of such treatment.

Respondent shall not engage in the practice of podiatry until notified by the BPM or its designee of its determination that Respondent is medically fit to practice safely.

27. Medical Treatment

Within 60 days of the effective date of this decision, Respondent shall submit to the BPM or its designee, for its prior approval, the name and qualifications of a physician of respondent's choice. Upon approval, Respondent shall undergo and continue treatment until the BPM deems that no further medical treatment is necessary. Respondent shall have the treating physician submit quarterly status reports to the BPM.

The BPM may require Respondent to undergo periodic medical evaluations by a BPM-appointed physician. The Respondent shall pay the cost of such evaluation.

28. Monitoring

Within 30 days of the effective date of this decision, the entire practice will be monitored, including, but not limited to the following: medical records, charting, pre and postoperative evaluations, and all surgical procedures.

The BPM shall immediately, within the exercise of reasonable discretion, appoint a doctor of podiatric medicine from its panel of consultants as the monitor. The monitor shall provide periodic reports to the BPM or its designee. The BPM or its designee shall determine the frequency and practice areas to be monitored. Such monitoring shall be required during the entire period of pro-

bation. The BPM or its designee may at its sole discretion also require prior approval by the monitor of any medical or surgical procedures engaged in by the respondent. The Respondent shall pay all costs of such monitoring and shall otherwise comply with all requirements of his/her contract with the monitor, a copy of which is attached as "Appendix A." If the monitor terminates the contract, or is no longer available, the BPM or its designee shall appoint a new monitor immediately. Respondent shall not practice at any time during the probation until the Respondent provides a copy of the contract with the current monitor to the probation officer and such contract is approved by the Board.

Respondent shall provide access to the practice monitor of respondent's patient records and such monitor shall be permitted to make direct contact with any patients treated or cared for by Respondent and to discuss any matters related to respondent's care and treatment of those patients. Respondent shall obtain any necessary patient releases to enable the monitor to review records and to make direct contact with patients. Respondent shall execute a release authorizing the monitor to provide to the BPM or its designee any relevant information. If the practice monitor deems it necessary to directly contact any patient, and thus require the disclosure of such patient's identity, Respondent shall notify the patient that the patient's identity has been requested pursuant to the disciplinary order. This notification shall be signed and dated by each patient prior to the commencement or continuation of any examination or treatment of each patient by Respondent and a copy of such notification shall be maintained in each patient's file. The notifications signed by respondent's patients shall be subject to inspection and copying by the BPM or its designee at any time during the period of probation that Respondent is required to comply with this condition. The practice monitor will sign a confidentiality agreement, requiring him or her to keep all patient information regarding respondent's patients in complete confidence, except as otherwise required by the BPM or its designee.

Appendix "A"

MONITORING CONTRACT

1. Respondent, Gerald D. Austin, Jr., DPM, (hereinafter "respondent") and (Name of Monitor), DPM, (hereinafter "monitor") agree that the purpose of the present contract is to have monitor perform, in exchange for compensation from respondent, the duties of monitor, as set forth in the decision and order of the Board of Podiatric Medicine in case No. 1B-2002-138520 (hereinafter "decision and order").

2. Respondent shall compensate monitor at the rate of \$[to be determined] per hour for all work performed in executing the duties of monitor.

3. Monitor shall submit a billing statement on a monthly basis to Respondent for all work performed in executing the duties of monitor and shall concurrently submit a copy of the billing statement to the board or its designee. The billing statement shall be mailed by certified mail to Respondent no later than the tenth of each month. The billing statement shall present an itemization of all work performed, the date and number of hours, and the corresponding charges. Respondent shall pay for all work performed within 30 days of receiving the billing statement.

4. Monitor shall be required to perform the duties of monitor in accordance with the terms and conditions in the decision and order. Monitor, while performing the duties of monitor, shall be subject to the authority of the board and may be terminated from the monitorship if he/she fails to perform satisfactorily the duties, responsibilities, or powers vested in him/her by the order and decision of the board.

5. The board may alter the duties of monitor in accordance with the terms and conditions of the decision and order.

6. Respondent shall comply and cooperate with monitor in executing terms and conditions of the decision and order of the board.

7. The board, or its designee, shall have the exclusive right to determine whether monitor is satisfactorily performing the duties, responsibilities, or powers vested in him/her by the order and decision of the board.

8. Monitor shall be held harmless by Respondent from any legal claim, cause of action, or action arising from any opinions rendered, statements made, or testimony given to the Board of Podiatric Medicine or its representatives, whether oral or written, in the course of executing the duties of monitor.

Date: Gerald D. Austin, DPM

Date: (Name of Monitor), DPM,

29. Probation Costs

Respondent shall pay the administrative costs incurred by the BPM associated with probation monitoring each and every year of probation. Such costs shall

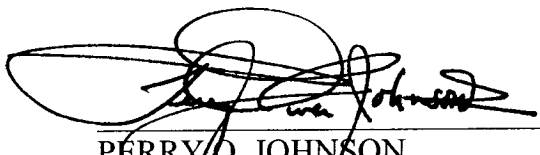
Respondent shall, upon or before the effective date of this Decision, post or circulate a notice which actually recites the offenses for which Respondent has been disciplined and the terms and conditions of probation, to all employees involved in his/her practice. Within fifteen (15) days of the effective date of this Decision, Respondent shall cause his/her employees to report to the BPM in writing, acknowledging the employees have read the Accusation and Decision in the case and understand respondent's terms and conditions of probation.

31. Changes of Employment

Respondent shall notify the BPM in writing, through the assigned probation officer, of any and all changes of employment, location, and address within thirty (30) days of such change.

SEVERABILITY CLAUSE - Each term and condition of probation contained herein is a separate and distinct term and condition. If any term and condition of this Order, or any application thereof, is declared unenforceable in whole, in part, or to any extent, the remainder of this Order, and all other applications thereof, shall not be affected. Each term and condition of this Order shall separately be valid and enforceable to the fullest extent permitted by law.

DATED: February 25, 2004



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings